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September 30, 2011

The Honorable Robert D. Drain  
United States Bankruptcy Court  
Southern District of New York  
300 Quarropas Street  
White Plains, New York 10601

**Re: *In re: DPH Holdings Corp, et al., Chapter 11, Case No. 05-44481 (RDD)*  
*Motion by James Sumpter For Recoupment On Behalf Of Delphi Salaried*  
*Retirees (Docket No. 21534)***

Dear Judge Drain,

I write in response to Mr. Sumpter's email, dated September 26, 2011. After further review we acknowledge that at the September 22, 2011 hearing we incorrectly identified the payor of Mr. Sumpter's disability benefits. We apologize for our error.

During the hearing, we stated that health and welfare benefits are paid by a VEBA trust fund pursuant to the Salaried OPEB Settlement Order (Docket No. 16545); that the salaried retirees' disability benefit payments are being paid from a source other than the Reorganized Debtors; and that the Reorganized Debtors are no longer paying salaried retiree disability benefit payments. *See September 22, 2011 Hearing Transcript, attached, pp. 7-12.* In fact, while substantially all OPEB benefits were terminated following the Salaried OPEB Settlement Order, the disability benefit continued. Mr. Sumpter's disability benefit is paid by Sedgwick CMS, a third-party claims agent. Delphi Automotive Systems LLC ("New Delphi") funds the disability benefit, and not the Reorganized Debtors. DPH Holdings Corp. ("DPHH") then reimburses "New" Delphi both the amount of the actual disability benefit payment plus the cost of any third-party administrative expenses (e.g., Sedgwick fees).

As stated during the hearing, there are no charges or deductions applied to Mr. Sumpter's disability benefit and Mr. Sumpter does not otherwise reimburse Sedgwick, New Delphi or any of the Reorganized Debtors, including DPHH (together the "Delphi Entities"). Although social security and other third party sources affect the amount of Mr. Sumpter's disability benefit, there is not a credit to Delphi or payment from Mr. Sumpter to any Delphi Entities. Third-party benefits were taken into account in the year 2000 when the amount of Mr. Sumpter's disability benefit was calculated. In other words, third-party benefits are simply an element of the formula

Honorable Robert D. Drain

September 30, 2011

for determining disability entitlements and are not later credited to any Delphi Entities. As a result, Mr. Sumpter's benefit has remained unchanged since his disability payments began in 2000.

Notwithstanding our error, the Court's September 22, 2011 denial of Mr. Sumpter's motion remains appropriate for the following reasons:

- 1) As this Court found, Mr. Sumpter's claim arises from benefit plan changes specifically authorized and approved by this Court. The Salaried OPEB Settlement Order (Docket No. 16545) and, ultimately, the Plan Modification Order (Docket No. 18707), which authorized the debtors to terminate the OPEB plans, remain res judicata as to Mr. Sumpter's claim and can no longer be challenged. *See Hearing Transcript, pp. 16-18, 20.*
- 2) Those same Orders preclude Mr. Sumpter's claim under principles of collateral estoppel. Mr. Sumpter cannot have a recoupment claim unless (among other things) he has suffered an actionable wrong and resulting damages to be recouped. Thus, Mr. Sumpter argues that "as a means to mitigate the adverse effect of the lost of [sic] OPEB benefits and in an effort to establish the correct value of the discharged OPEB benefit, the Movant seeks to recoup, for the disable retiree[s], their prior and ongoing Social Security reimbursements..." *See James Sumpter's Amended Motion For Recoupment On Behalf Of Delphi Salaried Retirees ¶ 12.* Any claim that the elimination of OPEB benefits was wrongful is precluded by the final Orders of this court approving their elimination. *See Hearing Transcript, pp. 13-15, 20.*
- 3) The Plan Modification Order specifically addressed and permanently enjoined recoupment claims. The Plan Modification Order remains res judicata as to Mr. Sumpter's claim, irrespective of the fact that the Reorganized Debtors currently reimburse New Delphi for the disability payments. *See Hearing Transcript, pp. 17-20.*
- 4) Mr. Sumpter's claim is barred by his failure to submit an administrative claim before the bar date, since it arises out of the Debtors' conduct (elimination of the OPEB benefits) between the filing of the bankruptcy petition and the date set forth in the Administrative Bar Date Order. *See Hearing Transcript, pp. 16-18.*
- 5) Mr. Sumpter is still improperly seeking to assert a right "affirmatively", as there is no DPH claim being asserted against Mr. Sumpter; the Reorganized Debtors are merely paying Mr. Sumpter his disability benefit determined in accordance with the terms of the disability plan. *See Hearing Transcript, pp. 18, 20-21.*

Accordingly, the Reorganized Debtors respectfully ask the Court to uphold its earlier ruling denying Mr. Sumpter's motion.

BUTZEL LONG

In order to supplement and correct the record, we are filing this letter in DPH Holdings Corp., *et al.*, Chapter 11 Case No. 05-44481 (RDD). We will, of course, respond to any questions the Court may have regarding this letter. In addition, we will await guidance from the Court as to whether we are to prepare a Proposed Order consistent with the hearing transcript and this letter.

Respectfully,

  
Cynthia J. Haffey / *cjh/anthony*  
(P70012)

Cynthia J. Haffey

Enclosure

cc: James Sumpter, via U.S. Mail and electronic mail

BUTZEL LONG

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2 UNITED STATES BANKRUPTCY COURT

3 | SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-44481 (RDD)

5

**6 | In the Matter of:**

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8 DPH HOLDINGS CORP., et al.,

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10 | Reorganized Debtors.

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14                         United States Bankruptcy Court  
15                         300 Quarropas Street  
16                         White Plains, New York

17

18 | September 22, 2011

19 10:09 AM

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21 B E F O R E :

22 | HON. ROBERT D. DRAIN

**23 U.S. BANKRUPTCY JUDGE**

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2 HEARING re Motion For Recoupment on Behalf of Delphi Salaried  
3 Retirees

4

5 HEARING re Claims Objection Hearing Regarding Claims of Alla  
6 Averbukh, on Behalf of the Estate of Boris Averbukh, as  
7 Objected to in the Reorganized Debtors' Motion for Order (i)  
8 Enforcing Modification Procedures Order, Modified Plan and Plan  
9 Modification Order Injunction and Forty-Seventh Omnibus Claims  
10 Objection Order Against Averbukhs, as Plaintiffs, in Maryland  
11 State Court Wrongful Death Action; and (ii) Directing Averbukhs  
12 to Dismiss Action to Recover Upon Discharged and Expunged Claim  
13 ("Averbukh Injunction Motion")

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25 Transcribed by: Lisa Bar-Leib

Page 3

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2 **ALSO APPEARING:**

3 **JAMES B. SUMPTER**

4           **On Behalf of Himself as a Delphi Salaried Retiree**

5           **21169 Westbay Circle**

6           **Noblesville, IN 46062**

7

8 **BY: JAMES B. SUMPTER, PRO SE**

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PROCEEDINGS

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THE COURT: Please be seated. Okay. Good morning.

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In re DPH Holdings.

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MS. HAFFEY: Good morning, Your Honor. Cynthia Haffey for DPH. Your Honor, we have two agendas for the Court today, the proposed seventieth omnibus hearing agenda. And on that agenda, there are no continued or adjourned matters and there is one contested matter. And that's the motion by James Sumpter for recoupment on behalf of Delphi salaried retirees.

10

THE COURT: Right.

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12

MS. HAFFEY: And I understand that Mr. Sumpter is on - joining us today by telephone.

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THE COURT: Are you on the phone, Mr. Sumpter?

14

MR. SUMPTER (TELEPHONICALLY): Yes, I am.

15

THE COURT: Okay. Good morning.

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MR. SUMPTER: Good morning.

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MS. HAFFEY: We also have the proposed forty-eighth claims hearing agenda. And under "Continued or Adjourned Matters", Your Honor, there is a claim objections hearing regarding claims of Ohio Bureau of Workers' Compensation. And that matter has been adjourned until the November hearing date.

There is, under the "Uncontested, Agreed or Settled Matters", the claims objection hearing regarding claims of ATS Ohio Inc. ATS Automation Tooling Systems, Inc. and ATS Michigan Sales and Services, Inc. And that matter has been resolved by

1 the parties, Your Honor.

2 THE COURT: Okay.

3 MS. HAFFEY: The only contested matter today is the  
4 claims objection hearing regarding claim of Alla Averbukh on  
5 behalf of the estate of Boris Averbukh. And I understand that  
6 counsel for the Averbukhs is here present in the courtroom.

7 THE COURT: Okay. So why don't we deal with the  
8 motion by Mr. Sumpter first?

9 MS. HAFFEY: Sounds good, Your Honor.

10 THE COURT: Okay. The parties should assume that I've  
11 read the papers through Mr. Sumpter's reply that was filed, I  
12 guess, yesterday in this matter. So I have that background.  
13 Is Delphi or DPH still making any payments under the various  
14 OPEB plans?

15 MS. HAFFEY: Your Honor, I believe the payments are  
16 being made out of a VEBA trust fund.

17 THE COURT: Under the VEBA?

18 MS. HAFFEY: Yes.

19 THE COURT: And is there -- that's under the  
20 settlement, though, right?

21 MS. HAFFEY: That's correct.

22 THE COURT: Okay. There are no other payments being  
23 made and that's consistent with the fact that the plans were  
24 terminated.

25 MS. HAFFEY: That's correct, Your Honor.

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1 THE COURT: Okay. So, Mr. Sumpter, your motion  
2 actually looks for a refund, right, not a crediting against  
3 future payments to you?

4 MR. SUMPTER: I think it asks for both. I will say  
5 this. The disability payments are still being made when you  
6 asked if there were still being payments made by Delphi.

7 THE COURT: But that's under the VEBA settlement,  
8 right?

9 MR. SUMPTER: No. No, it's not, not to my -- no. The  
10 VEBA was created out of the funds that were, I'll say, paid  
11 when the retirees agreed not to follow through with their  
12 appeal. But that had nothing to do with the disability  
13 benefits.

14 THE COURT: But Delphi terminated its disability plan  
15 or plans and the other OPEB plans. So --

16 MR. SUMPTER: No, it did not.

17 THE COURT: -- I don't see how there would be any more  
18 payments coming from Delphi. There might be payments from  
19 insurers or government agencies or if people used the VEBA  
20 settlement to buy a new policy, they would come from that  
21 policy. But I don't think there any checks being cut by Delphi  
22 at this point, right?

23 MR. SUMPTER: Well --

24 THE COURT: You don't get a check from Delphi itself,  
25 do you?

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1 MR. SUMPTER: Not from Delphi. But I've been -- prior  
2 to the OPEB benefits being terminated, I received a check from  
3 the administrator which I think it was Mr. Politan (ph.) at the  
4 time.

5 THE COURT: All right. So -- I mean, yes. There were  
6 checks obviously until the OPEB was terminated; Delphi was  
7 cutting checks.

8 MR. SUMPTER: Well, but now I'm receiving checks from  
9 Sedgwick --

10 THE COURT: Okay.

11 MR. SUMPTER: -- who took over for Politan.

12 THE COURT: Right.

13 MR. SUMPTER: So -- and I have checked with several  
14 other disability recipients and they are also receiving checks.  
15 Apparently, there are two different organizations that are  
16 paying checks. But a number of people are receiving checks  
17 from Sedgwick.

18 THE COURT: Okay. So it seems to me then that what  
19 you're asking for here is for Delphi or its successor, DPH, to  
20 actually cut a check to make up --

21 MR. SUMPTER: Well, I'm asking -- okay. I'm asking  
22 for two things. One is there is currently an obligation to  
23 reimburse for social security benefits so that if we receive  
24 social security benefits in our disability, we receive Delphi  
25 that amount towards that disability.

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1 THE COURT: Well, is Delphi looking for Mr. Sumpter to  
2 pay it anything in respect of social security that he's  
3 received? I'm not asking you, Mr. Sumpter. I'm asking  
4 Delphi's counsel.

5 MS. HAFFEY: If it's a credit or an offset, Your  
6 Honor.

7 THE COURT: I'm sorry?

8 MS. HAFFEY: A credit or an offset, Your Honor.

9 THE COURT: But Delphi isn't paying anything to him.  
10 So I don't know why there would be any credit.

11 MS. HAFFEY: It would -- Your Honor, I believe it  
12 would be an offset to the trust account.

13 THE COURT: But the trust account isn't Delphi's.

14 MS. HAFFEY: That's correct.

15 THE COURT: I'm really just focusing on Delphi now.

16 MS. HAFFEY: That's correct, Your Honor.

17 THE COURT: Maybe you want to talk to your -- okay.  
18 So did you want to confirm that with your client?

19 MS. HAFFEY: Please. Thank you.

20 (Pause)

21 MS. HAFFEY: That's correct, Your Honor.

22 THE COURT: What's correct?

23 MS. HAFFEY: That Delphi itself is not expecting a  
24 credit.

25 THE COURT: Or a check --

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1 MS. HAFFEY: Or a check.

2 THE COURT: -- from Mr. Sumpter --

3 MS. HAFFEY: That's correct.

4 THE COURT: -- for anything that he got in respect of  
5 payments from another party.

6 MS. HAFFEY: That's correct, Your Honor.

7 THE COURT: Okay. So this is -- so the crediting was  
8 all historical then. The crediting was based on -- was only in  
9 the context of amounts that Delphi owed retirees under the  
10 various OPEB policies. And they would be crediting  
11 historically against that amount. But that's all been done in  
12 the past. There's no more of that to continue in the future as  
13 far as Delphi is concerned.

14 MS. HAFFEY: That is correct, Your Honor.

15 THE COURT: Okay.

16 MR. SUMPTER: Your Honor, may I ask? This is James  
17 Sumpter. I'm just confused about one thing. In the orders  
18 that dealt with the termination of benefits, they did not --  
19 those orders did not reference disability at all. It  
20 referenced health care benefits, health care savings account,  
21 Medicare supplements. But they -- the disability benefits were  
22 not referenced at all in the order or in the motions to  
23 terminate. And so, my -- I've been operating just based on  
24 what I've been living with here in terms of the disability  
25 payments, that that has continued. If they've assigned that to

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1 someone else then I have no knowledge of it. They've made us  
2 not aware of that. And the -- I know that people are still  
3 making payments for reimbursing social security.

4 THE COURT: I don't know. That issue wasn't really --  
5 I didn't deal with that issue in preparing for this hearing. I  
6 don't know --

7 MS. HAFFEY: Your Honor, the settlement did terminate  
8 all of Delphi's health and welfare plans which included those  
9 disability benefits.

10 THE COURT: Okay. I mean, it's possible that  
11 disability may be paid through another source, right? There  
12 may be either the substitute plan under the VEBA or some other  
13 insurance but Delphi is not funding that?

14 MS. HAFFEY: That's correct, Your Honor.

15 THE COURT: Okay. All right. Okay. All right.  
16 Again, I have reviewed the papers on this. And that last  
17 discussion dealt with my remaining questions, factual  
18 questions, on this matter. I don't really need additional  
19 argument but if either side wants to make their point or  
20 supplement a point from their papers, you can do so.

21 MS. HAFFEY: Your Honor, if I could just make -- and  
22 point the Court's attention to -- give me one moment -- two  
23 things, Your Honor. In our response, we say that the general  
24 rule is that recoupment is not a claim. But then we cite to  
25 the In re King's Terrace Nursing Home case. Better stated,

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1 Your Honor, is that recoupment in the Second District is a  
2 claim. And we have cited that case in our brief. So I just  
3 wanted to point out to the Court that it should have been  
4 stated a little stronger.

5 And to Mr. Sumpter's point in regards to res judicata,  
6 I'd like to point the Court's attention to Corbett v. MacDonald  
7 Moving Services, Inc., 124 F.3d 82 (2nd Cir. 1997). In that  
8 case, the Court states that -- Mr. Sumpter claims that res  
9 judicata isn't present here because the claim basically hadn't  
10 ripened. I think that's in point 5 of his reply brief. The  
11 Court in Corbett states that the claim had been ripe in the  
12 bankruptcy context because, of course, a claim is matured and  
13 unmatured claims, liquidated and unliquidated claims. And I  
14 have a copy of that for the Court.

15 And that's all we have to add, Your Honor.

16 THE COURT: Okay.

17 MR. SUMPTER: And this is James Sumpter. And I have  
18 one issue to raise. When Mr. Chiappetta requested that Your  
19 Honor dismiss my motion, you responded that you would not do  
20 that but he had the option to request a dismissal based on part  
21 7 rule. And you indicated they had been incorporated into  
22 contested matters. And so, looking at that, I admitted my  
23 motion to comprehend the rule so that I alleged that this was a  
24 core proceeding. But there's Rule 7012 that makes that same  
25 requirement for the response to the motion. And the response

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1 from the debtor did not allege that these proceedings were core  
2 or noncore.

3 And so, my thinking is that their response did not  
4 meet the requirements and should be rejected. And so, I was  
5 asking Your Honor to reject or dismiss their response because  
6 it did not meet the core -- the Rule 7012.

7 THE COURT: Okay. All right. Okay. I have a motion  
8 before me -- it's actually an amended motion although they're  
9 very close, that is the amended motion and the original  
10 motion -- by James Sumpter "for recoupment on behalf of Delphi  
11 salaried retirees". Although the motion is styled as on behalf  
12 of Delphi salaried retirees and not just on behalf of Mr.  
13 Sumpter, he acknowledges in his reply to the debtors' objection  
14 to the motion, "The Movant does not claim to represent or serve  
15 as an attorney for other salaried retirees." And so, I am  
16 treating this motion as a motion solely on behalf of and by Mr.  
17 Sumpter and not on behalf of anyone else who, as Mr. Sumpter  
18 acknowledges, have not authorized him to make the motion on  
19 their behalf.

20 In his motion, Mr. Sumpter argues that he is entitled  
21 to and requests a refund from Delphi in respect of deductions  
22 that Delphi took under various so-called OPEB benefit plans for  
23 retirees for amounts that were due to the beneficiaries of  
24 those plans from third parties, including Social Security  
25 payments and the like, that under the plans acted as a credit

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1 against the amounts that Delphi would owe, in essence, to avoid  
2 double counting.

3 The context of this motion is important. Delphi  
4 maintained, pre-bankruptcy and during most of its bankruptcy  
5 case, various OPEB plans for salaried employees and retirees  
6 and their spouses. The debtors moved, however, on February  
7 4th, 2009 seeking the Court's approval to cease contributions  
8 to such plans commencing April 1st, 2009. And on February  
9 2nd -- I'm sorry -- February 25th, 2009, the Court entered a  
10 provisional order granting that relief and then entered an  
11 order on March 11th, 2009 granting the termination motion  
12 pursuant to which the debtors did terminate their OPEB plans.

13 Notwithstanding that order, the Court, recognizing the  
14 uncertainty under the law as well as the potential for a win-  
15 win situation, authorized the appointment of a committee of  
16 retirees to negotiate with the debtor over a potential  
17 resolution of the issues raised by the OPEB termination motion  
18 and the March 11th, '09 order. And the debtor subsequently  
19 entered into a settlement agreement pursuant to which there was  
20 a settlement of the appeal from the termination order as well  
21 as a resolution that appealed that provided for the debtors  
22 paying a considerable sum of nine million dollars which, except  
23 for the part that went to attorneys' fees, went to help fund a  
24 health and benefit plan, so-called VEBA plan that provided for  
25 replacement benefit coverage albeit incomplete replacement

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1 benefit coverage.

2                 However, with the exception of that settlement,  
3 pursuant to which Delphi committed the money that I've -- or  
4 paid the money that I've just discussed, Delphi ceased, as  
5 authorized by the Court, making any future OPEB payments.

6                 Thus, it is clear to me that the relief that Mr.  
7 Sumpter seeks in his motion is -- as generally styled in the  
8 motion, seeking an affirmative recovery from Delphi in the form  
9 of a refund of the amounts that Delphi had previously reduced  
10 OPEB payments by, i.e., the amount paid for the same types of  
11 claims by third parties.

12                 The Delphi debtors, later in 2009, specifically on  
13 June 16th, 2009, obtained a bar date order that required that  
14 all administrative claims, that is claims arising from the  
15 commencement of Delphi's Chapter 11 case through June 1, 2009,  
16 be filed by July 15th, 2009 or be forever barred in the case.

17                 Subsequently, on July 30th, 2009, Delphi obtained this  
18 Court's approval of confirmation -- on the modification and  
19 confirmation of its modified Chapter 11 plan. That order,  
20 entered by the Court on July 30th, 2009 and referred to by  
21 Delphi and stated in its caption as the "Plan Modification  
22 Order", first incorporates the discharge under Article 11.2 of  
23 the modified plan into the confirmation order. And in  
24 addition, in paragraph 22, the discharge having been  
25 incorporated in paragraph 20 of the plan modification order --

1       in paragraph 22, the plan modification order states, in  
2       relevant part, that "All persons shall be precluded and  
3       permanently enjoined on and after the effective date of the  
4       modified plan from the enforcement attachment collection offset  
5       recoupment or recovery by any matter or means of any judgment  
6       or decree or order or otherwise with respect to any claim,  
7       interest, cause of action or any other right or claim against  
8       the reorganized debtors which they possessed or may possess  
9       prior to the effective date of the Chapter 11 plan."

10           That order is a final order and under Section 1144 of  
11          the Bankruptcy Code cannot be revoked even for fraud by the  
12          plain terms of Section 1144 of the Code.

13           Finally, it should be noted that this Court has  
14          disallowed administrative claims by Mr. Sumpter filed in  
15          respect of his claims for termination of the OPEB plans by  
16          order dated December 2, 2009. In addition, the Court, in  
17          connection with the litigation over the termination of the OPEB  
18          benefits found as moot Mr. Sumpter's motion in this case to  
19          enforce COBRA benefits for salaried retirees and motion for  
20          COBRA settlement. It did that by order dated August 3, 2009.  
21          And in addition, the Court, in an order entered June 27, 2011,  
22          denied Mr. Sumpter's motion for a stay of proceedings regarding  
23          the VEBA in lieu of COBRA.

24           Thus, the record is quite clear that Mr. Sumpter is  
25          barred by res judicata in the form of the Court's prior orders

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1 from either (a)challenging the Court's order authorizing the  
2 debtors to terminate the OPEB plans; (b)the VEBA settlement;  
3 and (c)already disallowed administrative claims arising from  
4 the alleged nonpayment or failure to pay OPEB.

5 Mr. Sumpter, in his motion presently before the Court,  
6 contends that his recoupment theory is not covered by the  
7 Court's prior orders in that he is seeking not to have an  
8 administrative claim allowed or an affirmative recovery from  
9 Delphi in respect of the credits that it took when it paid him  
10 in the past OPEB benefits.

11 The debtors disagree and also contend that even if the  
12 legal theory upon which Mr. Sumpter relies is characterized as  
13 recoupment, they contend that he is barred the confirmation  
14 order and the discharge under the law in this district from  
15 asserting even in light of recoupment as opposed to an  
16 affirmative claim.

17 I find and conclude as a matter of law based upon the  
18 facts asserted by Mr. Sumpter and the Court's prior orders and  
19 related documents incorporated into those orders and Mr.  
20 Sumpter's motion that the motion must be denied on the basis of  
21 the following conclusions.

22 First, the plan modification order, by its expressed  
23 terms, as I've already quoted, permanently enjoins any person,  
24 including Mr. Sumpter, from recoupment as well as offset or any  
25 other form of recovery by any manner. It's clear that a

1 bankruptcy court's order confirming a Chapter 11 plan  
2 constitutes a final judgment on the merits and is to be given  
3 preclusive effect under res judicata. In re American Preferred  
4 Prescription, Inc., 266 B.R. 273, 277 (E.D.N.Y. 2000). See  
5 also Sure-Snap Corp. v. State Street Bank & Trust Co., 948 F.2d  
6 869, 872-73 (2nd Cir. 1991) and In re I. Appel Corp., 300 B.R.  
7 564, 567 (S.D.N.Y. 2003) aff'd Katz v. I.A. Alliance Corp., 104  
8 Fed. Appx. 199 (2nd Cir. 2004).

9 While there are conflicting cases as to whether the  
10 proper application of the doctrine of recoupment survives the  
11 discharge under either Chapter 7 or, as in this case, Chapter  
12 11 of the Bankruptcy Code, it is clear that a confirmation  
13 order that specifically enjoins permanently the assertion of  
14 the doctrine of recoupment constitutes res judicata, where that  
15 order is final, as a plan modification order is, and the party  
16 against whom the order is asserted for res judicata purposes  
17 had sufficient notice of it for due process purposes which is  
18 undisputed here. See Daewoo International (America) Corp.  
19 Creditor Trust v. SSTS America Corp., 2003 U.S. Dist. LEXIS  
20 9802 at 17-18 (S.D.N.Y. June 9, 2003) in which District Judge  
21 Buchwald specifically found, as is directly on point here, that  
22 a party that had constructive notice of the bankruptcy case and  
23 confirmation order of the debtor, Daewoo America, was barred by  
24 res judicata from asserting a right of recoupment given the  
25 specific injunction in the confirmation order of the assertion

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1 of such a right.

2 So based upon the res judicata effect of paragraph 22  
3 of the plan modification order, Mr. Sumpter's motion should be  
4 denied.

5 In addition, the debtor is correct that at least one  
6 case in this district has held, even in the absence of a  
7 specific provision in the confirmation order enjoining a  
8 recoupment right or the assertion of a recoupment right that  
9 the discharge under Section 1141 of the Bankruptcy Code and the  
10 broad definition of "claim" in Section 101(5) precludes the  
11 assertion of recoupment rights after the confirmation and  
12 effective date of a Chapter 11 plan. See *In re King's Terrace*  
13 *Nursing Home*, 184 B.R. 200, 204 (S.D.N.Y. 1995). That is  
14 particularly the case here where the debtor is not picking and  
15 choosing with regard to the provisions of a contract that it  
16 wants to perform and those that it does not want to perform  
17 since, as is the case here, the debtor obtained permission to  
18 terminate its OPEB benefits contracts.

19 Even if I were not to agree with the logic of a King's  
20 Terrace Nursing Home case, moreover, the so-called recoupment  
21 right in Mr. Sumpter's motion is not in fact a proper form of  
22 recoupment for purposes of overcoming a Chapter 11 discharge.  
23 That is because, as I noted earlier, Mr. Sumpter is not  
24 asserting the doctrine of recoupment as it needs to be asserted  
25 on a defensive basis but is rather instead looking for a refund

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1 from DPH, as the successor to Delphi, for payments that  
2 allegedly should have been made before the termination of the  
3 OPEB plans. Recoupment -- in other words, he is looking for  
4 DPH to cut a check to him as opposed to credits for future  
5 payments that Delphi or DPH would be making none of which, in  
6 fact, DPH is making or is required to make.

7 Recoupment is a defensive doctrine and not a separate  
8 cause of action or weapon of offense. See *In re Drexel Burnham*  
9 *Lambert Group, Inc.*, 113 B.R. 830, 854 (Bankr. S.D.N.Y. 1990).  
10 See also *Bull v. United States*, 295 U.S. 247, (1935).

11 The cases that have the successful assertion of the  
12 recoupment doctrine notwithstanding a debtor's discharge all  
13 involve cases or situations where there are still running  
14 payments to be made to or by the debtor against which credits  
15 can be asserted defensively pursuant to recoupment. On the  
16 other hand, it is clear that where the defense -- where  
17 recoupment is used offensively and not simply as a defense, it  
18 is clearly a claim under Section 101(5) of the Code. And, as  
19 I've noted before, in respect of claims, Mr. Sumpter already  
20 has been determined not to have a timely claim in this case and  
21 his claims have been disallowed. See *In re Izaguirre*, 166 B.R.  
22 484, 492-93 (Bankr. N.D. Ga. 1994).

23 Thus, the motion should be dismissed on the  
24 alternative ground that it does not rely on a proper that is,  
25 defensive, theory of recoupment but actually asserts a claim

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1 that is barred by the Court's prior bar date orders as well as  
2 the discharge under paragraph 20 of the plan modification and  
3 Article 11.2 of Delphi's confirmed and effective Chapter 11  
4 plan.

5 The debtors requested both informally, through an e-  
6 mail to chambers that was cc'd to Mr. Sumpter, as well as  
7 formally, when the Court required the filing of a formal  
8 objection to the motion and hearing, that the Court enter an  
9 order barring Mr. Sumpter from bringing further litigation  
10 against them in respect of the manners that this Court has  
11 already adjudicated by final order. I took this request  
12 seriously. Mr. Sumpter has now raised an attack against either  
13 the OPEB termination motion, the VEBA settlement, which is also  
14 res judicata, and/or the assertion of his claims arising from  
15 the nonpayment of benefits at least three times. And the  
16 debtors' estate clearly should not be further burdened by  
17 attacks arising from the same facts but based upon different  
18 legal theories that either don't fly or that were effectively  
19 dealt with when I previously dealt with such attacks.

20 On the other hand, Mr. Sumpter is pro se. And I do  
21 take that into account in evaluating whether he is acting  
22 improperly or in bad faith in raising legal theories that  
23 clearly have no merit in that they've already been dealt with  
24 by the Court or, alternatively, simply don't make any sense, as  
25 frankly this recoupment theory -- it didn't make any sense. At

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1 least, they wouldn't make any sense to a lawyer versed in basic  
2 principles of bankruptcy law. However, Mr. Sumpter isn't a  
3 lawyer so I decided first to treat this matter through written  
4 submissions by the parties and a hearing today. And secondly,  
5 I decided not to enjoin him from bringing further actions.

6 On the other hand, by no means should Mr. Sumpter take  
7 that ruling as a license to bring further actions that are not  
8 premised upon a good faith real argument. The debtors have  
9 their rights under -- in matters before this Court --  
10 Bankruptcy Rule 9011, in matters in the federal district court  
11 or other federal courts under Civil Procedure 11 and in their  
12 corollaries under the various state court procedures for  
13 bringing frivolous or bad faith claims. And Mr. Sumpter is  
14 duly warned that notwithstanding his pro se status, he is on  
15 clear notice that future motions in violation of the -- or  
16 other litigation in violation of the plan modification order or  
17 this Court's prior orders or the Delphi debtors' discharge  
18 under their Chapter 11 plan should merit the imposition of  
19 sanctions. And the debtors can certainly use this transcript  
20 in that regard if such litigation is commenced outside of this  
21 court.

22 So again, for the reasons that I've stated on the  
23 record, the motion's denied as a matter of law under the  
24 equivalent of or based upon the factors applied by the Court  
25 under Bankruptcy Rule 7012 in light of the Court's prior orders

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1 and the undisputed facts asserted in the motion.

2 So the debtors or DPH can submit an order to chambers  
3 by e-mail consistent with that ruling.

4 MS. HAFFEY: Thank you, Your Honor.

5 MR. SUMPTER: Your Honor, this is James Sumpter. And  
6 I appreciate the consideration I've gotten. I guess I would  
7 like to tell the Court that my actions have not been intended  
8 to be malicious but a sincere effort for --

9 THE COURT: That's why I ruled the way I have. But I  
10 think you're on notice now, Mr. Sumpter, that I really don't --  
11 unless -- every matter I need to review or some other Court  
12 needs to review on its merits. But you really need to think  
13 very clearly about anything that deep down really does  
14 challenge any of the things that are now approved by a final  
15 order by me.

16 MR. SUMPTER: And I understand that. And I just  
17 wanted to say, though, that I just would -- I don't have the  
18 physical resources to go tilting at windmills. So if you  
19 apprec -- you know, if you understand the kind of effort that I  
20 put into it, I just wouldn't do it if I didn't sincerely --  
21 even if I was wrong -- think that I had a case. But I really  
22 don't anticipate any other action.

23 THE COURT: Okay. Very well.

24 MR. SUMPTER: But could I ask a clarification that is  
25 not intended to challenge a ruling or anything like that? But

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1 I am really just still confused on one point. And I'm looking  
2 at the -- what's here -- the filing they requested, the  
3 termination of benefits.

4 THE COURT: Right.

5 MR. SUMPTER: And it eliminates post-paid retirement  
6 health care benefits for current and future. It ceases the  
7 company from making contributions to post-retirement health  
8 care. It cancels all retiree health reimbursement accounts.  
9 For Medicare, it terminates Medicare part B. It stops the one  
10 percent employee contribution to scholarly retirement savings  
11 program for people hired after a certain date. And it  
12 eliminates retirement for post-retirement basic life insurance.  
13 And those are the only categories that it covers. It does  
14 reference disability at all. And so, that's my confusion.

15 THE COURT: All right. Well, I don't have that before  
16 me, Mr. Sumpter, so I can't really comment on it. What I  
17 recommend is that you speak to the debtor's -- DPH's  
18 representative about it. Maybe they can show you what they  
19 believe covers your disability in that order and/or prior  
20 orders that I entered dealing with COBRA. So I think you know  
21 who to speak to. Have you spoken with them before?

22 MR. SUMPTER: I don't know. There's a transition that  
23 seems to be taking place.

24 THE COURT: Well, there's a gentleman who's here in  
25 the courtroom who deals with claims. You can speak to him

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1 about it. Or you can contact the lawyer who spoke today. Why  
2 don't you give him your name, ma'am?

3 MS. HAFFEY: Mr. Sumpter, this is Cynthia Haffey. You  
4 can give me a call at (313) 983-7434. I'll be back in the  
5 office on Friday.

6 MR. SUMPTER: All right.

7 THE COURT: And she can point you to the reasons  
8 Delphi believes -- or DPH believes that it terminated validly  
9 the disability -- its obligation to pay disability payments.  
10 Okay?

11 MR. SUMPTER: Okay.

12 THE COURT: All right. Thank you very much.

13 MR. SUMPTER: Thank you.

14 THE COURT: Okay. So that leaves DPH's motion to  
15 enforce the plan injunction and the discharge against the  
16 Averbukh plaintiffs.

17 MR. KLEIN: Yes, Your Honor. Sheldon Klein of Butzel  
18 Long on behalf of DPH reorganized debtors.

19 MR. STEINBERG: Good morning, Your Honor. Rick A.  
20 Steinberg of Ciardi Ciardi & Astin for Vladimir Averbukh and  
21 Alexander Averbukh.

22 THE COURT: Okay. You -- both sides should assume  
23 that I've read the papers on this through DPH's reply to the  
24 Averbukh's response to their motion. I don't think there's  
25 been anything after that filed.